

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 RICHARD MILBOURN,

4 Plaintiff,

5 v.

6 LEGAL INSIGHTS, INC., *et al.*,

7 Defendants.
8

Case No.: 3:19-cv-00087-RCJ-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF Nos. 1, 1-1, 1-2, 3, 4

9 This Report and Recommendation is made to the Honorable Robert C. Jones, United States
10 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
11 § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1-2, 3) and
13 pro se complaint (ECF No. 1-1, 4, 4-1).

14 **I. IFP APPLICATION**

15 A person may be granted permission to proceed IFP if the person “submits an affidavit that
16 includes a statement of all assets such [person] possesses [and] that the person is unable to pay
17 such fees or give security therefor. Such affidavit shall state the nature of the action, defense or
18 appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

19 The Local Rules of Practice for the District of Nevada provide: “Any person who is unable
20 to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The
21 application must be made on the form provided by the court and must include a financial affidavit
22 disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.
23

1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 An inmate submitting an application to proceed IFP must also “submit a certificate from
6 the institution certifying the amount of funds currently held in the applicant’s trust account at the
7 institution and the net deposits in the applicant’s account for the six months prior to the date of
8 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
9 at the institution for less than six months, “the certificate must show the account’s activity for this
10 shortened period.” LSR 1-2.

11 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
12 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
13 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
14 deposits or the average monthly balance for the six-month period immediately preceding the filing
15 of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid, the
16 prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
17 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody of
18 the prisoner will forward payments from the prisoner’s account to the court clerk each time the
19 account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

20 Plaintiff’s certified account statement indicates that his average monthly balance for the
21 last six months was \$0.07 and his average monthly deposits were \$0.
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1 Plaintiff's application to proceed IFP should be granted. Plaintiff should not be required to
 2 pay an initial partial filing fee; however, whenever his prison account exceeds \$10, he must make
 3 monthly payments in the amount of 20 percent of the preceding month's income credited to his
 4 account until the \$350 filing fee is paid.

5 **II. SCREENING**

6 **A. Standard**

7 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
 8 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
 9 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
 10 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
 11 § 1915(e)(2)(A), (B)(i)-(iii).

12 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
 13 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
 14 which a prisoner seeks redress from a governmental entity or officer or employee of a
 15 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
 16 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1)
 17 is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
 18 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

19 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 20 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 21 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
 22 complaint under these statutes, the court applies the same standard as is applied under Rule
 23 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule

1 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
2 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

3 The court must accept as true the allegations, construe the pleadings in the light most
4 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395
5 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less stringent
6 standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)
7 (internal quotation marks and citation omitted).

8 A complaint must contain more than a "formulaic recitation of the elements of a cause of
9 action," it must contain factual allegations sufficient to "raise a right to relief above the speculative
10 level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain
11 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
12 cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff
13 should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see*
14 *also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 A dismissal should not be without leave to amend unless it is clear from the face of the
16 complaint that the action is frivolous and could not be amended to state a federal claim, or the
17 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
18 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

19 **B. Plaintiff's Complaint**

20 Plaintiff sues Legal Insights, Inc., an entity he alleges is a 501(c)(3) non-profit, as well as
21 its director, Randy Soderstrom. Plaintiff is imprisoned within the Nevada Department of
22 Corrections (NDOC), and alleges that he is a targeted victim of fraud based on an October 28,
23 2016 letter he received from the company. He attaches a letter of that date from Legal Insights,

1 Inc., stating that they are post-conviction specialists and offer assistance, including discounted
2 assistance, with state habeas corpus petitions. They state that they charge a non-refundable fee
3 starting at \$3,000 to review the file, and then will provide a proposed course and a total reasonable
4 cost to pursue the remedies (with the initial fee being applied to the total cost). It also mentions
5 that they offer payment plans. It is signed by Director Randy Soderstrom. (ECF No. 4 at 7.)

6 Plaintiff does not allege how this letter from Legal Insights, Inc./Soderstrom was
7 fraudulent. It offers to provide legal services in connection with post-conviction proceedings, and
8 outlines the services provided and the initial rates. There is no federal (or state) fraud claim asserted
9 by way of this complaint. Nor does the court find that amendment could cure the deficiencies of
10 the complaint. Therefore, the complaint should be dismissed with prejudice.

11 III. RECOMMENDATION

12 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

13 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1-2, 3). Plaintiff should not be
14 required to pay an initial partial filing fee; however, whenever his prison account exceeds
15 \$10, he should be required to make monthly payments in the amount of 20 percent of the
16 preceding month's income credited to his account until the full \$350 filing fee is paid. This
17 is required even though the court has recommended dismissal of the action. The Clerk
18 should be directed to **SEND** a copy of an order adopting and accepting this Report and
19 Recommendation to the attention of **Chief of Inmate Services for the Nevada**
20 **Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

21 (2) The complaint (ECF No. 4-1) should be **FILED**.

22 (3) The action should be **DISMISSED WITH PREJUDICE**.

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1 The Plaintiff should be aware of the following:

2 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
3 this Report and Recommendation within fourteen days of being served with a copy of the Report
4 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report
5 and Recommendation” and should be accompanied by points and authorities for consideration by
6 the district judge.

7 2. That this Report and Recommendation is not an appealable order and that any notice of
8 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
9 until entry of judgment by the district court.

10 DATED: July 11, 2019.

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12 William G. Cobb
13 United States Magistrate Judge
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